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CASES CITED.

TREATIES.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 187.

SEUFERT BROTHERS COMPANY, APPELLANT,

v.

THE UNITED STATES OF AMERICA AS TRUSTEE AND GUARDIAN OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION OF INDIANS AND AS TRUSTEE AND GUARDIAN OF AND EX REL. SAM WILLIAMS.

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v.

SEUFERT BROTHERS COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTICT OF OREGON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a suit brought by the United States, as guardian of the Indians named in its title, to restrain the defendant, an Oregon corporation, from inter-

fering with the right saved to those Indians by their treaty with the United States to fish at a certain place on the south shore of the Columbia River. The treaty was made June 9, 1855.[1] The relief sought was granted in part. (See 233 Fed. 579.) Both parties appeal. Upon further consideration, the United States does not press its appeal, but is content to rest upon the decree.

I.

THE FACTS.

On June 9, 1855, a treaty was negotiated between the United States and a group of Indian tribes which for the purposes in hand were considered a single people, the Yakima Nation. By it (2 Kappler's Indian Affairs, 524) there was ceded to the United States a vast extent of land. A specific tract was reserved for the exclusive occupancy of the Indians who acknowledged their dependence upon the United States. By Article III, it was said:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory,* and of erecting temporary buildings for curing them.

[1] This treaty was considered by this Court in connection with a fishing place on the *north* bank of the Columbia River in *United States* v. *Winans*, 198 U. S. 371 It is there referred to as the Treaty of 1859, the year of ratification.

The importance of fishing rights to Indian aborigines and especially to the tribes of the northwest is a familiar circumstance.

The bill as amended (R. 22–32) alleged that the Yakima Indians had been wont, from time immemorial, to fish at a usual and accustomed place on the south bank of the Columbia River about three miles above the City of The Dalles, described "in accordance with the government survey" as

> that certain portion of the rocks which, at low water, constitute the south bank of the Columbia River opposite lot number 3, in section 36, township number 2, north of range 13, east of the Willamette meridian, in the County of Wasco, State of Oregon. (R. 24.)

The bill continues with a particular claim to a particular point within the *locus* so described, but the claim of a fishing ground is as to that "generally and particularly described." (R. 24.) This fishing ground is variously referred to in the record but usually by its Indian names of Wah-Sucks or Cum-Sucks or by their English equivalents, "Lone Pine," or "Lone Tree," etc. For convenience the fishing place will be referred to herein as "Lone Tree Point."

It was further alleged that the defendant had interfered with the right of the Yakima Indians to fish at Lone Tree Point and especially that it had prevented Sam Williams, a Yakima Indian, by various acts of interference from taking fish there, and more particularly at the point in the fishing place specifically de-

scribed in the bill. It alleged also that the defendant was appropriating said fishing place to itself by anchoring fish wheels and fish scows thereat with the effect of permanently excluding all other persons from the points so occupied (Cmp. *United States* v. *Winans*, 198 U. S. 371, 382), and by constructing and maintaining a wall upon the shore, with the result of interfering with fishing in the adjacent stream.

The prayers of the bill sought the establishment of the *locus* described as a usual and accustomed fishing place of the Yakima Nation within the meaning of the treaty of 1855, asked injunctions against the particular interference with Sam Williams referred to and concluded with a prayer for such other further and different relief as the nature of the cause might require and as to the Court might seem meet and just.

The answer admitted, *inter alia*, the building of the wall mentioned in the bill (R. 41) and the maintenance of a fish wheel about 750 feet above the spot on Lone Tree Point, particularly referred to in the bill (R. 45), as well as at that point (R. 41, 42). Ownership of lot number 3 in section 36, etc., the land along which the ancient fishing place was alleged to lie, was claimed for the defendant. In paragraph IV (R. 37) the answer specifically sets up the claim that the fishing rights along the Columbia secured to the Yakima Indians by the treaty were confined to the north bank thereof.

There was a trial at which the evidence of many witnesses was heard by the Judge. The record is not

entirely clear, but there are indications that what appears in the transcript while voluminous (pp. 69–671) is not all that was taken. The testimony was not only conflicting,[1] but from the nature of the issue it resulted that many of the witnesses, including those best qualified to testify to conditions as they were in 1855, were persons of advanced age. Among these was a large proportion of Indians testifying through an interpreter. Under such circumstances the familiar rule as to the weight to be given by an appellate court to the findings of fact made by the trial court has direct and compelling application.

The Judge found that Cum-Sucks or Lone Tree Point, on the south bank of the Columbia River, was a usual and accustomed fishing place of the Yakima Indians in 1855, and he made a decree (R. 56–59) enjoining the defendant from interfering with the use by said Indians, or any one or more of them, of said fishing place, from preventing the erection upon the adjacent rocks of temporary structures for use during the fishing season and from preventing access of said Indians to said fishing place. In the decree (par. II, R. 57) the limits of the fishing place as found to be established are defined. It is a part of the south shore or bank of the river opposite lot number 3 in section 36, township 2, etc., and in that respect conforms to the claim of the bill. The Judge found, however, that the evidence did not sufficiently

[1] See certificate of the District Judge, R. 671.

establish that the whole of the *locus* claimed in the bill was included in the ancient fishing place but found that the fishing place began at a point somewhat further up stream. The particular point mentioned in the bill with reference to Sam Williams' fishing was therefore not included. "The place where the evidence of this case shows Peter Jackson's scow fish wheel has heretofore been located" was specifically included. (R. 57.) It appears from the testimony of defendant's officers that Peter Jackson's scow fish wheel was so located under a license granted by the State to defendant and he "fished the place for" the defendant. (R. 636.)

The Government predicated its cross appeal in part upon the refusal of the District Judge to include the spot mentioned in connection with Sam Williams within the ancient fishing place. It is about 150 feet below the downstream boundary established by the Judge. (R. 571.) There was evidence that it was in fact within the fishing place as used by the Yakimas (R. 393, 418, 421, 429, 670), which at least warranted, if in view of all the circumstances and especially those affecting the difficulty of proof as to such a matter, it did not require such a finding. In view, however, of the rule mentioned as to the effect of the finding of the trial Court upon conflicting evidence the matter is not pressed upon the Court.

It is deemed unnecessary, for the same reason, to set out in detail the evidence which supports the Court's finding that Lone Tree Point within the limits defined by the decree was a place to which the

Yakima Indians were accustomed from time to time to resort to fish and to cure their catch. In the margin that evidence is summarized with references to the record.[1]

As bearing upon the principal contention of the defendant, which is based upon the circumstance that the fishing place here in question is upon the south bank of the river, whereas the Yakima Indians are said to have principally resided north of the river and the river is set out in the treaty as a part of the boundary of the land ceded by them, the following matters of public record and judicial knowledge must be borne in mind. At the moment when this treaty was negotiated the United States was engaged also in negotiating like treaties with the other principal tribes of Indians in the Northwest with the intention

[1] It is undisputed that salmon run only at certain seasons and can only be caught at certain points and, as among these points, only when the water is at a proper stage at a particular point.

Many witnesses testified to the friendly relations, intermingling and intermarriage of the Indians north and south of the river. (Waters, R. 82; Handley, R. 128, 9; Pipeshire, R. 156; Tommy, R. 166; McNary, R. 183; McFarland, R. 224; Spencer, R. 236; Shea-Wa, R. 255, 6; Dick, R. 269; Seelatee, R. 328; Charley, R. 336; Whitcomb, R. 348; Thomas, R. 368; Wannassay, R. 379, 80; Jackson, R. 401.)

That the Indians on either side crossed the river to reach any fishing point which chaneed to be available at a given time; that they knew no boundaries as regards fishing on the Columbia River; that the river was regarded as a common table free to all; that fishing places were freely shared; that the Yakimas fished on the south bank of the river as a matter of right and not of casual favor to individuals was also the testimony of many witnesses including in addition to aged Indians who had spent their lives fishing on the river a number of disinterested white settlers. (Waters, R. 84, 85; Handley, 129, 151; Simpson, 90, 93; Shea-Wa, R. 256, 264; Bruno R. 416; Laughlin, R. 96, 105; Jensen, R. 214, 219; Thomas, R. 370; Dick, R. 270, 274; Pipeshire, R. 155, 156; Smith, R. 319, 320; Wannassay, R. 379; Pa-Na-Wuck, R. 420; Kuck-Up, R. 434; Me-Nin-Ocht, R. 307; Wallulatum, R. 423, Holiquillo, R. 427.)

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of extinguishing the Indian title to that whole territory and opening it to general settlement. For the purposes of the Government it was convenient and desirable that the treaties should be so phrased that the descriptions of the territory ceded by the various tribes should leave no interstices as to which later question could arise. For this and other reasons it was also desirable to deal with the various tribes, both as to cession of territory and as to the determination of their future places of settlement, in groups. The group boundaries were naturally therefore so delimited as to be contiguous. It was equally natural that they should follow but only in the most general way the rather vague ideas of the Indians as to claims of territorial dominion. The Yakimas abode for the most part north of the Columbia River. South of the river were the "Indians of middle Oregon" with whom as a group a similar treaty was negotiated about ten days after that now in question. (2 Kappler, 536.) Under such circumstances it was inevitable that the river should be taken as a convenient boundary of the respective cessions.[1] The matter of boundaries was of course of no interest to the Indians, who were agreeing thenceforth to live upon reservations not affected by them. But the matter of the fishing rights was one of vital concern, as was the availability of both banks of the Columbia River for fishing. Whatever they may

[1] A like treaty was made, also on June 9, 1855, with the Walla Walla Indians and associated tribes. The same practice of making the boundaries exact and contiguous was followed. (2 Kappler, 521.) A complete list of this set of treaties appears in a note on p. 17 *post*.

have thought and however little they may have cared about the matter of territorial dominion, they did know, as one of the Indian witnesses put it, that

> the river was a common table for both, both sides of the river. It lay right in between them and they came and ate and were gone. (Shea-Wa, R. 256.)[1]

And the District Judge found (R. 52, 53), upon abundant testimony (R. 106, 107, 194, 195, 211, 233, 240, 271, 368, 369, 374, 375, 379, 401, 256, 264, 129, 307, 423, 427, 90, 82, 84, 85, 416, 96, 105, 214, 219), that the Indians upon either side of the river were accustomed in every sense of the word to cross it from time to time for the purpose of taking fish as the fishing varied because of the season or other conditions without any thought of territorial division between the tribes as to rights in the river itself.

It may be remarked that the statements in appellant's brief (pp. 20–22) which apparently suggest the inference that negation of Yakima fishing rights upon the south bank of the Columbia was a matter of general consent in the Northwest, if material, do not appear to be supported by counsel by any references to the testimony herein. Attention also is called to the first paragraph of page 6 of

[1] The testimony of this witness is much too long to set out in full (R. 254–268) but it is picturesque, interesting and illuminating. In the main it has been deemed best to refrain from quoting from the testimony of these Indian witnesses, because quotations from such testimony taken with an interpreter if read without the whole context may easily be misleading. Only the trial Judge who heard it all, with the witnesses before him, could fairly determine its weight.

appellant's brief. While probably not so intended, the phrasing of the sentence and the use of italics might lead to the inference that in the treaty of 1865 with the Wascos a right saved to them in their treaty of 1855 to fish "*on their side of the river*" (I quote a part of italicised language) was surrendered and extinguished. What was surrendered and extinguished was the right to fish in the river at all. There is no mention of sides of the river in either treaty. (2 Kappler, 536, 693.) This fact is also to be borne in mind in appraising the argument made by appellant later in its brief (pp. 41–43).

Certain facts about Sam Williams, who is mentioned in the title of the bill and in the decree (Par. V, R. 58), remain to be stated. The bill was brought originally by the United States as guardian of all Indian wards of the United States *ex relatione* of Sam Williams. It is alleged that Sam was a full-blood Indian, a member of the Yakima Nation and as such an allottee of lands within that reservation and a ward of the United States. The bill was thereafter amended so that the United States brought the suit as guardian of the tribes known as the Yakima Nation, as well as all the individual members thereof to protect said Indians in the treaty right already described "and particularly to protect the rights and privileges of Sam Williams as a member of said Yakima Nation."

The Court granted relief to the United States as guardian of the Yakima Nation and enjoined defendant from interfering with them "or any one of them"

in the exercise of their fishing rights. (R. 58.) As to Sam Williams, however, it was said, in paragraph V of the decree that he is not a ward of the United States Government in the sense that the Government is required to and should interpose in his behalf to protect his rights, if any, to the privilege of fishing at the location named herein. (R. 58.)

It will be observed that the Court did not find that Sam Williams was not a Yakima Indian, nor did it find that he did not have a right in common with other Yakima Indians to fish at the *locus* in question.

Whether or not the Judge was correct in ruling upon the facts set out in the opinion (R. 53) that Williams had ceased to be a ward of the United States in the sense that the United States could not bring this suit to protect his rights under the treaty of 1855 was sought to be raised by the cross appeal of the United States. The question, however, does not seem material, in view of the fact that the decree does not adjudicate the question whether Sam is a Yakima Indian, and the further fact that the United States prevailed as guardian of Yakima Indians generally.

II.

THE CONTENTIONS OF THE PARTIES.

The principal contention of the appellant in this Court (Appt's. Brf. pp. 1, 2) is based upon the circumstance that the decree establishes in the Yakima Indians fishing rights at a place upon the south bank of the Columbia River, whereas that river was itself in

part the southern boundary of the territory expressed in the treaty of 1855 to have been ceded by these Indians. It is said that the language of Article III of the treaty by which the right is saved to the Indians to take fish at "all usual and accustomed places" must refer only to such places within the territory ceded and that, therefore, a place upon the south bank of the river can not be construed to be within the intendment of the treaty, whatever may have been the actual facts as to its use by the Indians.

To this the United States replies that the natural and ordinary meaning of the words used imports the inclusion of all places at which the Yakima Indians were in fact used and accustomed to fish; and that such a construction is reinforced and made inevitable when the rules laid down by this Court for the interpretation of Indian treaties are applied in the light of the attendant circumstances.

The remaining contentions of the appellant are best stated by quoting the questions as to which it says the judgment of the Court is sought. These are set out on page 10 of its brief. They are:

> Second. Could the Court, over the objection of the defendant permit an amendment virtually substituting the Yakima Tribe of Indians in the place of Sam Williams as a plaintiff, and involving entirely different rights and issues?
>
> Third. Could the Court after finding that the place claimed by Williams and described in both the original and amended complaint had

never been used by the Yakima Indians as a fishing place, proceed to enter a decree as to other places never in issue at all.

Fourth. Could the Indians (if they had any right to fish on the Oregon side at all) abandon their simple methods at the time of the treaty and assert a treaty right to fish with exclusive and monopolistic contrivances, like permanent fish wheels in front of white man's premises.

To the first of the contentions last mentioned, it is answered that the bill as amended raised no different issues from those presented by it as originally drawn and that, apart from this, there was no error in allowing the amendment.

To the second it answers that the *locus* included in the decree while less extensive than that claimed in the bill was nevertheless clearly put into issue and that in any event there was no error in the Court's action.

To the third the United States replies that no such question is raised by the decree appealed from. All that is said is that the Indians are not confined to their ancient methods of fishing. (R. 58.) It is clearly pointed out by the opinion that the manner in which the Indians are to exercise their established rights, in common with citizens of the United States, was not before the Court but could be dealt with when it arises. (R. 55, 56.)

The assignment of errors raises certain other points but it is assumed from their omission from defendant's statement of the questions raised and

from its brief that they are not pressed. While appellant's brief (pp. 62–66) contains a short discussion under the heading, "Did Yakima Indians Ever Fish at the Point in Question?" that discussion is opened with the admission that there was a great deal of conflicting testimony on the point. It consists principally of counsel's opinion as to the value of Indian testimony, based in part on some isolated excerpts from the testimony of three of the witnesses. No assignment of error predicated upon the Judge's finding that the Yakima Indians did in fact make a practice of fishing at Lone Tree Point appears to be urged upon the Court.

III.

THE ISSUES.

The issues upon which the determination of the Court appears therefore to be required are

1. Was it competent for the Court to establish as a usual and accustomed fishing place under the treaty of 1855 a fishing place upon the south shore of the Columbia River?

2. In view of the technical history of the case was any error committed

(*a*) In permitting the amendment to the bill and in granting relief thereupon?

(*b*) In establishing the *locus* described in the decree as a usual and accustomed fishing place of the Yakima Indians?

(*c*) In making a part of the decree a remark that in exercising their rights under the treaty, the Yakima Indians were not confined to aboriginal methods of fishing?

ARGUMENT.

I.

A fishing place upon the south bank of the Columbia River to which the Yakima Indians were in fact accustomed to resort is a usual and accustomed fishing place within the meaning of the treaty of 1855.

The District Judge found that the Yakima Indians, at the time of the treaty, were used to visit what is herein called Lone Tree Point, on the south bank of the Columbia River, for the purpose of fishing. This finding is admitted by appellant to have been supported by a "great amount of evidence" (App't's Brf., p. 62). To this evidence reference has already been made. The propriety of the finding of fact does not seem to be seriously challenged by the appellant. But it is vigorously contended that the Judge was wrong in ruling that this point was a "usual and accustomed place" within the meaning of the language of the treaty. It is said that the words, as used in the treaty, refer only to places within the territory described as ceded to the United States, and that the place in question is not within that territory since it is on the south bank of the river and the river itself is named as in part the southern boundary of the cession.

The question presented is of course one of construction. It is whether the words "all usual and

accustomed places" really mean all places to which the Indians were used and accustomed to resort or whether they mean something less. That they mean what they appear to say is their natural and ordinary construction. No language limiting them geographically appears in the treaty. If they are to be construed to include fishing places on the *north* bank of the Columbia River (*United States* v. *Winans*, 198 U. S. 371) but not places, however usual and accustomed in fact, on the *south* bank thereof, the limitation must be found in something outside the language of Article III.

When, for the purpose of examining this contention, one turns from the words used to their context and to the circumstances under which the treaty was made, one begins with the fact that it was a treaty with the Indians. The words of such a treaty are to be construed "in the sense in which they would naturally be understood by the Indians." (*Jones* v. *Meehan*, 175 U. S. 1, 11.) They "should never be construed to their prejudice" (*Worcester* v. *Georgia*, 6 Pet. 515, 582). In the *Winans* case, *supra*, the rule of construction was summed up by Mr. Justice McKenna. He said (at page 380)—

> We will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the

> superior justice which looks only to the substance of the right and without regard to technical rules."

The language here to be construed related to a right "not much less necessary to the existence of the Indians than the atmosphere they breathed." (*United States* v. *Winans, supra,* at 381.) It remains, then, to inquire what, in the light of the circumstances, the Indians must have understood by the words in question and to ask whether there is anything which requires this Court to exclude from the comprehension of "all usual and accustomed places" a usual and accustomed place upon the south bank of the Columbia River.

This treaty was one of a group which were negotiated practically simultaneously with the view of extinguishing the Indian title to all this northwestern corner of the United States.[1] For that purpose it was desirable that the boundaries of the cessions be so accommodated that no interstices should be left as to which later question could arise. It was desired, as the District Judge notices (R. 50), to conclude the operation "within a comparatively short compass of time," and it was so accomplished. The

[1] Treaty with the Yakima, June 9, 1855 (2 Kappler's Indian Affairs, 524); With the Nisqualli, Puyallup, etc., Dec. 26, 1854 (Ibid., 495); With the Calapooias, etc., Jan. 22, 1855 (Ibid., 498); With the Dwamish, Suquamish, etc., Jan. 22, 1855 (Ibid., 531); With the S'Klallam, etc., Jan. 26, 1855 (Ibid., 504); With the Makah, etc., Jan. 31, 1855 (Ibid., 510); With the Walla Walla, etc., June 9, 1855 (Ibid., 521); With the Nez Perces, June 11, 1855 (Ibid., 528); With the Tribes of Middle Oregon, June 25, 1855 (Ibid., 536); With the Quinaielt, etc., July 1, 1855 (Ibid., 539); With the Flathead Nation, July 16, 1855 (Ibid., 542), etc.

exactness of the definitions of the boundaries, so long as they were made contiguous, was not very important even to the United States. It was of no consequence to the Indians who were agreeing to give up their claim to a vast territory and to concentrate their settlement upon a smaller area unaffected by the boundaries in question. But the matter of fishing rights was a circumstance of the greatest importance to them. They knew that they were accustomed freely to resort to both banks of the Columbia River as to "a common table" in which they shared rights with other tribes, as has already been pointed out. They were told that the right so to resort to "all usual and accustomed places" was saved to them.

The proposition that under these circumstances they understood the words "all usual and accustomed places" to be subject to such limitations growing out of the common law with respect to conveyances of real estate that they included usual and accustomed places on the north bank of the river and did not include equally usual and accustomed places upon the south bank is to ask too much of the unlettered understanding of the Indians.

In *United States* v. *Winans, supra*, the right of the Indians to fish at usual and accustomed places upon the north bank of the river was in question and was established, but no question arose as to fishing places on the south bank. It is worthy of note that the interference there complained of in part consisted in the placing by defendants in front of their lands fishing wheels which resulted in the exclusive occupation

by defendants of the space so occupied. (198 U. S. 371, 382.) The appellant here lays a good deal of stress upon certain language in the opinion of this Court which is said to show that the fishing rights referred to in Article III of this treaty exist only in so far as they can be said to result from reservations as to the land granted. From which it is argued that there can not be such rights as to places not within the territorial limits adopted for describing the cession by the Indians. The reservation is, however, as is clearly shown by the opinion, not to be read with the strictness which might be observed in construing a grant of land between individuals of equal capacity. And it was a reservation of existing rights, one of which was to fish in the Columbia River. The Yakimas had and exercised as undoubted a right to fish at all usual and accustomed places in that river as to occupy any of the land which they were supposed to occupy, and this right was reserved without reference to any other consideration.

If indeed the matter is to be dealt with only with regard to the limits of the cession these limits themselves must be read as the Indians must have understood them. The limit so expressed is "the Columbia River," and not the north bank or the middle of the channel thereof. To the Indians, no reason for distinguishing between the two banks of the river, to which alike they had been accustomed to resort, could have occurred. In the language of the District Judge, "so it is that the Columbia River as a bound-

ary may not mean as much to them as to the mind of the superior white man." (R. 51.)

If the natural meaning of the words "all usual and accustomed places" is to be so limited as to exclude some "usual and accustomed places," the intention so to limit them must be shown to have been so expressed as to clearly convey to the Indian mind the fact of such limitation. There is not a single word in the treaty which could even have been calculated to convey such an impression.

It is indeed suggested by appellant (Brf., p. 29) that the words "in common with the citizens of the Territory" lend support to a construction of the language as referring only to places within the particular territory ceded. The apparent result would be to exclude from such fishing places persons not Yakima Indians and not citizens of what then was Washington Territory. A far more reasonable and natural construction is that of the District Judge, who refers to the contemporaneous treaties previously mentioned and to the language used in them for making a similar reservation and concludes that the words were intended to mean "citizens of the United States" and no more. (R. 51.) Apart from the question whether, when the treaty is properly read, the Columbia River is not to be taken as within the territorial limits of the cession, the construction of the District Court has also the support of the rule that "the language used in treaties with the Indians should never be construed to their prejudice." *Worcester* v. *Georgia*, 6 Pet. 515, 582.

The matter was well stated by the District Judge and attention is respectfully directed to his discussion of it. (R. 49–52.) His conclusion that the treaty must be so construed as to include within the rights reserved the right to fish at the usual and accustomed fishing places of the Yakimas on the south bank of the Columbia River is clearly correct.

II.

No error was committed by the District Court in allowing the amendment to the bill and its granting relief thereupon.

While this point is included by appellant among the questions which it says are submitted to the Court on its appeal (Appt.'s Bf., p. 10), the only reference to it other than its mere statement appears to be a passing remark on page 7. Comparison of the amended bill with that originally filed will show that the change is merely in that the original bill was brought by the United States "as trustee and guardian of all Indian wards of the United States ex rel. Sam Williams," and the amended bill was brought as guardian of the Yakima nation as well, as of the individual members thereof, as trustee of the allotted lands of said Indians and as guardian and trustee of all the rights and privileges reserved to said Yakima Indians by the treaty of June 9, 1855. The fishing rights sought to be established and the places at which they are claimed are exactly the same.

The defendant was put to no disadvantage and was not prejudiced or taken in any way by surprise as a result of allowing the amendment.[1] Under these circumstances an appellate Court will not review the action of the trial Court in allowing an amendment even at a very late stage of the case. *Richmond* v. *Irons*, 121 U. S. 27, 46; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257.

In fact, where an action is brought by the United States to protect the property rights of Indians the United States is the real party and the Indians are neither necessary parties nor can they exercise any control over the litigation although they are bound by the decree. *Heckman* v. *United States*, 224 U. S. 413, 444, 446. The amendment in question was in fact immaterial.

III.

The District Court was justified under the pleadings and proof in finding the fishing place to be at the location described in the decree.

Paragraph V of the amended bill (R. 24) alleges the existence of a fishing place of the Yakima Indians, described "in accordance with the Government survey" as "that certain portion of the rocks which, at

[1] While the record does not clearly show at what stage of the case or under what circumstances the amendment was made, it appears that after a motion to dismiss the amended bill was overruled, on July 12, 1915, an answer thereto was filed on July 21. (R. 35.) The hearing on the merits seems to have come on in January, 1916 (R. 143, 167, etc.), and the defendant was putting in evidence in chief on Jan. 31 and Feb. 1, 1916. (R. 559, 600.)

low water, constitute the south bank of the Columbia River, opposite lot No. 3, in section 36, township No. 2 north, of range 13 east of the Willamette Meridian, in the County of Wasco, State of Oregon." It alleges further that the fishing place "as in this paragraph generally and particularly described, was, at the time of said treaty, always has been, and now is one of the usual and accustomed" fishing places of the Yakima Indians. Each of these allegations is specifically denied in paragraph V of the answer (R. 37).

The bill prays (R. 31) for a decree "establishing that the fishing place described in paragraph V herein is one of the usual and accustomed fishing places" of the Yakima Indians.

The decree (R. 57) establishes as an Indian fishing place a large part of the south shore of the Columbia River opposite said lot 3, excluding therefrom, however, a particular point at which Sam Williams claimed the right to fish.

Since the pleadings clearly tender the issue whether any portion of the shore of the Columbia River opposite lot No. 3, etc., is or ever was a usual and accustomed fishing place of the Yakimas, the court did not go outside the pleadings and prayer of the complaint in the finding and decree.

Even if there was ambiguity in the pleadings as to the claim of the Government in regard to the south bank of the Columbia River opposite lot No. 3 as an Indian fishing ground, the appellant can not now

predicate error upon the provision of the decree now under consideration. As has been shown it rested upon abundant proof. The witnesses who testified for the Government that Lone Tree Point was a usual and accustomed fishing place did not confine themselves to the particular place on that point at which Sam Williams was seeking to have his wheel located, nor did the defendant's witnesses. All the evidence went into the record without objection. If there were a variance between the pleadings and the proof it is clear that the appellant was not surprised or prejudiced thereby. It was well understood that one of the issues in the case was whether the entire point or any part of it, or, indeed, any point on the south bank of the river, was and always had been a usual and accustomed fishing place of the Yakima Indians.

> As there is enough in the bill as amended to warrant relief, and as the defendant could not have been taken by surprise, we do not think the decree should be reversed on the ground that the allegata and the probata do not sufficiently agree to justify it. (*Moore* v. *Crawford*, 130 U. S. 122, 142.)

IV.

The decree is not in error on the ground that it permits the Indians to fish with fish wheels or other monopolistic devices.

It is true that the decree provides (Par. VI, R. 58) that the Indians were not confined to their ancient and usual methods of catching fish, but were per-

mitted and to be encouraged to adopt the more modern methods and means of prosecuting their fishing enterprises; but it also provides (Par. III, R. 57) that the fishing privileges of the Indians are to be exercised in common with the citizens of the United States. That the court did not intend to permit the Indians any monopoly is shown by the following quotation from the opinion:

> The rights here ascertained and determined, it must be understood, are to be exercised in common with citizens of the United States, as the treaty so provides. How the common privilege is to be exercised is a subject with which we are not now concerned. When the subject arises, there will be found, it is hoped, a way of satisfactory adjustment (R. 55).

These remarks may be compared with what was said as to a very similar question in the *Winans* case, *supra*, in which this court referred the matter of working out such an accommodation to the trial court (198 U. S. 371, 384).

No error was made by the District Court in this part of its decree.

CONCLUSION.

The only substantial question presented by the defendant's appeal is whether there was warrant of law for a ruling that a usual and accustomed

fishing place under the treaty of 1855 might be found to exist on the south bank of the Columbia River. There is such warrant and the decree appealed from should be affirmed.

LaRue Brown,
Assistant Attorney General.

Leonard Zeisler,
Attorney.

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